Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

DAPHNEY D. TINGLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a case where the petitioner has exercised her right not to testify on her own behalf, does the prosecutor's knowing use of perjured testimony, which forced the defendant's counsel to bring out the fact that the defendant had been incarcerated during the time the witness testified that he purchased drugs from her, violate the defendant's Fourteenth Amendment right to a fair trial?

Where a sentence is based on convictions for one count of conspiracy to distribute cocaine and a separate count of distributing a specific amount of crack cocaine, should the petitioner's sentence be reduced when the conviction for distributing the specific amount of crack cocaine is dismissed, thereby lowering the base offense level under the sentencing guidelines?

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Petitioner Daphney D. Tingle respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is attached as Appendix A. There is no opinion from the United States District Court for the Eastern District of Wisconsin. The Judgment of the United States Court for the Eastern District of Wisconsin is attached as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 8, 1999. [Appendix B].

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .".

Federal Rule of Evidence 404(a)(1) provides in relevant part:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> > (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same . . .

STATEMENT OF THE CASE

The fundamental question in this case is whether the prosecutor's knowing use of perjured testimony violated the defendant's due process right to a fair trial, especially where the perjured testimony forced petitioner's counsel to allow the jury to find out that the defendant, who did not testify, had previously been incarcerated.

A. The Perjured Testimony and the Resulting Disclosure of Defendant's Incarceration

Petitioner Dapheny Tingle was arrested and charged with one count of conspiracy to distribute cocaine base and one count of distribution of cocaine base. The conspiracy is alleged to have taken place in Wisconsin between January 1, 1995 and June 23, 1996. The distribution is alleged to have taken place in Illinois and Wisconsin on June 23, 1996. It was alleged that Ms. Tingle ran a drug distribution business out of her home in Chicago, Illinois, and that she sold drugs to people who came to Chicago from Wisconsin, bought the drugs and then returned to Wisconsin to sell them.

One of Ms. Tingle's co-conspirators, Eric Law, pleaded guilty to the conspiracy, and was offered a point reduction in his sentence in return for testifying against Ms. Tingle. [T 175-18 to 177-20]. He testified that he started receiving cocaine, mostly in powder form, from Ms. Tingle in Chicago in the "first part of 1995" in quantities of ½ ounce to an ounce, maybe twice a month. [T 182-8 to 183-9]. On cross-examination, Mr. Laws was asked about his purchasing of cocaine from Ms. Tingle in January, 1995. He changed his testimony, indicating that because Ms. Tingle "was locked up for about four months", he was doing business with her boyfriend, Tutu, and that he did not see Ms. Tingle in January, 1995. [T 209-6 to 211-11]. He then stated that he did not personally talk to Ms. Tingle and that he did not get anything from her in January, February, March or April of 1995. [T 213-5 to 214-4; T 233-11 go 234-6].

On May 8, 1995, a search warrant was executed at the home of Eric Laws, sister on Byrd Avenue in Racine, Wisconsin. As a result of that search warrant, Mr. Laws was jailed and he remained incarcerated from May, 1995 to September, 1995. [T 175-2 to 14]. Mr. Laws testified that in October, 1995, he started meeting with Tutu at Gurnee Mills. He stated that Ms. Tingle came to Gurnee Mills with Tutu on one occasion, but that he gave his money to Tutu, not to Ms. Tingle. [T 214-16 to 216-12].

Mr. Laws was again incarcerated from Thanksgiving, 1995 to January 19, 1996. [T 216-13 to 217-2]. On May 29, 1996, Mr. Laws was incarcerated anew and he remained in jail until the end of September, 1996. [T 225-15 to 23].

On re-direct examination, the prosecutor spent some time on the subject of Ms. Tingle's being in jail, eliciting from

Mr. Laws the information that she had been in boot camp for three or four months, that he dealt with Tutu while Ms. Tingle was in jail, that he had dealt with Ms. Tingle before she went to jail, and that Ms. Tingle had been released from jail before he went to jail in May. [T 229-11 to 232-15].

The prosecution knew that Ms. Tingle had been incarcerated from January, 1995 until June, 1995. They had her rap sheet, which showed that she was in the custody of the Illinois Department of Corrections from January 3, 1995 until June 17, 1995. This 1995 incarceration was brought to light at Ms. Tingle's detention hearing, where an Assistant United States Attorney was present, and this incarceration was set forth in the Pretrial Services Report presented at the detention hearing. Furthermore, Ms. Tingle's incarceration at Dwight Correctional Center in Illinois from January 11, 1995 was noted in the criminal history report prepared by the prosecution before the trial.

In his summation, the prosecutor stated that Ms. Tingle was locked up in jail for awhile. [T 449-24 to 450-1].

B. Dismissal of the Specific Distribution Conviction and Its Effect on the Sentence

The government alleged that Ms. Tingle supplied both cocaine powder and cocaine base. Count One of the Indictment charged Ms. Tingle with being part of a conspiracy to distribute cocaine base between January 1, 1995 and June 23, 1996, in Wisconsin. The evidence established that Ms. Tingle was incarcerated from January to June, 1995. Mr. Laws testified that the cocaine he received after May, 1995 was "all the time powder" that he would cook up into crack cocaine. [T 188-10 to 23]. Mr. Laws'

brother, Davin, corroborated that the cocaine he and his brother received was white powder. [T 285-4 to 286-11].

Count Two of the Indictment charged Ms. Tingle specifically with the distribution of cocaine base to Oscar Rathers on June 23, 1996 in Illinois and Wisconsin. The evidence established that on June 23, 1996, Oscar Rathers had traveled from Racine, Wisconsin, to Chicago, Illinois, by train, that he had picked up the cocaine, and that he had returned to Wisconsin, where he was arrested. [T 324-7 to 327-25]. The amount of cocaine base seized was 636 grams. [Sentencing Tr. 3-13 to 20].

Ms. Tingle was convicted on both counts. In a pre-trial motion, a post-trial motion, and at the sentencing hearing, her counsel argued that because the only evidence of distribution on June 23, 1996 took place in Illinois, the proper venue for this offense was Illinois, not Wisconsin. This argument was rejected each time. [*See* Sentencing Tr. 3-13 to 4-15]. In sentencing Ms. Tingle, the judge accepted the amount of cocaine base as 636 grams. Under the Sentencing Guidelines, this calls for a base offense level of 36. USSG 2D1.1(c)(2). With this offense level and being assigned a criminal history category of IV, the guideline term of imprisonment is 262 to 327 months. Ms. Tingle was sentenced to a term of imprisonment of 262 months on Count One and 262 months on Count Two, the sentences to run concurrently. [Sentencing Tr. 26-13 to 27-1]. Base offense levels for cocaine powder call for lesser terms of imprisonment.

On appeal, the United States Court of Appeals for the Seventh Circuit ruled that because the specific distribution of the cocaine base alleged in Count Two took place in

Illinois and not in Wisconsin, the Eastern District of Wisconsin was not the proper venue for this offense. Consequently, Ms. Tingle's conviction on Count Two was reversed. [Appendix A: 8a to 14a].

The Court of Appeals stated that "[b]ecause Tingle's sentences for each count were to run concurrently, this reversal will not affect her terms of imprisonment or supervised release." [Appendix A: 18a].

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE KNOWING USE OF PERJURED TESTIMONY BY THE PROSECUTION RESULTED IN THE DISCLOSURE OF INADMISSIBLE EVIDENCE THAT THE PETITIONER, WHO DID NOT TESTIFY, HAD BEEN INCARCERATED, THEREBY VIOLATING THE DEFENDANT'S FUNDAMENTAL RIGHT TO A FAIR TRIAL

Under the Fourteenth Amendment to the United States Constitution, a State may not deprive anyone of life, liberty or property without due process of law. There can be no doubt that "a fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 1333, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942, 946 (1955), quoted in *Weiss v. United States*, 510 U.S. 163, 178, 114 S. Ct. 752, 761, 127 L. Ed. 2d 1, 15 (1994). Due process specifically prohibits the "deliberate deception of the court and jury" by a prosecutor's knowing use of perjured testimony. *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S. Ct. 349, 79 L. Ed. 791 (1935).

In *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct 1173, 3 L. Ed. 2d 1217 (1959), it was ruled that a conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict. The state court had determined that a prosecutor's failure to correct perjured testimony did not affect the verdict. In reversing, this Court overturned the defendant's conviction because the false testimony "may have had an effect on the outcome of the trial." 360 U.S. at 272. This Court stated that a conviction obtained by the knowing use of such testimony must fall, and it was suggested that the conviction is invalid even when the perjured testimony is not the result of guile or a desire to prejudice, since its impact is the same in preventing a trial that could in any real sense be termed fair. *Id.* at 270. In *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397, 49 L. Ed. 2d 342 (1976), this Court indicated that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."

In the case at bar, there is more than a reasonable likelihood that the false testimony of Eric Laws affected the judgment of the jury. Ms. Tingle had exercised her right not to testify, but because of Mr. Laws' false testimony that he began purchasing drugs from her in January, 1995, defense counsel was forced to bring out the fact that Ms. Tingle had been incarcerated from January to June, 1995, in an effort to show that Ms. Tingle could not possibly have sold drugs to Mr. Laws during that time. The prosecutor thereupon seized the opportunity to question Mr. Laws much more specifically in order to elicit many references to Ms. Tingle's having been "locked up", and he even alluded to it in his closing statement.

It is axiomatic that unless a defendant takes the stand and testifies in her own behalf, evidence of prior convictions is not admissible. Fed. R. Ev. 404(a)(1). The reason for this rule is that prejudice may occur when "evidence of convictions for prior, unrelated crimes may lead a juror to think that since the defendant already has a criminal record, an erroneous conviction would not be quite as serious as would otherwise be the case." 1 J. Strong, *McCormick on Evidence*, 780 (4th ed, 1992), quoted in *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574, 589 (1997). As stated in *Michaelson v. United States*, 335 U.S. 469, 482 (1948), evidence of character

> is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

In dissenting in part in *Spencer v. Texas*, 385 U.S. 554, 575, 87 S. Ct. 648, 659, 17 L. Ed. 2d 606 (1967), Chief Justice Warren observed:

> Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him. As Mr. Justice Jackson put it in a famous phrase, "[t]he naive assumption that prejudicial

> effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 *U.S.* 440, 453, [69 S. Ct. 716, 723, 93 L. Ed. 790] (concurring opinion) (1949). *United States v. Banmiller*, 310 F.2d 720, 725 (3d Cir. 1962). Mr. Justice Jackson's assessment has received support from the most ambitious empirical study of jury behavior that has been attempted, see Kalven & Zeisel, *The American Jury*, 127-130, 177-180.
>
> Recognition of the prejudicial effects of prior convictions evidence has traditionally been related to the requirement of our criminal law that the State prove beyond a reasonable doubt the commission of a specific criminal act. It is surely ingrained in our jurisprudence that an accused's reputation or criminal disposition is no basis for penal sanctions. Because of the possibility that the generality of the jury's verdict might mask a finding of guilt based on an accused's past crimes or unsavory reputation, state and federal courts have consistently refused to admit evidence of past crimes except in circumstances where it tends to prove something other than general criminal disposition.

In the case at bar, the prosecution knew that Ms. Tingle had been incarcerated from January to June, 1995. It was in possession of Ms. Tingle's rap sheets, which showed this incarceration. It was in possession of the Pretrial Services Report, presented at Ms. Tingle's detention hearing, which set forth this incarceration. It was in possession of the criminal history report prepared before trial. And, as a

practical matter, the federal drug agents would have checked on Ms. Tingle's criminal history as soon as her name arose in their investigation, and the prosecution would have known of this incarceration from this source as well. Thus, there can be no doubt that the prosecution knew that Ms. Tingle had been incarcerated from January, 1995 to June, 1995. The prosecution had to know that Mr. Laws would testify that he began receiving drugs from Ms. Tingle in January 1995, yet they allowed him to give this false testimony knowing that Ms. Tingle was not going to take the stand in her own defense so that this incarceration could not be brought out.

The prosecution's knowing use of this perjured testimony forced Ms. Tingle's counsel to elicit further testimony in order to show that she was incarcerated during this time and could not possibly have sold any drugs to anyone, especially Mr. Laws. Ms. Tingle had elected not to testify, so this incarceration would not have been admissible as evidence against her. By allowing perjured testimony and forcing the disclosure of the incarceration, the prosecution made an end run around the rules and violated Ms. Tingle's fundamental right to a fair trial free from prejudice. In *Stickler v. Greene*, __ U.S. __, 119 S. Ct. 1936, L. Ed. 2d (1999), this Court noted the special role played by an American prosecutor in the search for truth in criminal trials, stating that within the federal system, the United States Attorney is

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

In the case at bar, justice was not done. Accordingly, this Court should exercise its supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts as it did in *Marshall v. United States*, 369 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959), where it held that the prejudice to the defendant when evidence of the defendant's prior convictions reaches the jury through newspaper articles is as great as when it is a part of the prosecution's evidence.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE DISMISSAL OF THE SPECIFIC CHARGE OF DISTRIBUTING COCAINE BASE ON JUNE 23, 1996, SHOULD HAVE RESULTED IN A LOWER BASE OFFENSE LEVEL WHICH WOULD REDUCE THE DEFENDANT'S SENTENCE, AND THIS SHOULD BE CORRECTED BY AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

Ms. Tingle was charged with two counts in the indictment. Count One charged her with conspiracy to distribute cocaine base from January, 1995 to June 23, 1996. Count Two charged her specifically with distributing cocaine base on June 23, 1996. Count Two was based on 636 grams of cocaine base that was seized from Oscar Rathers on June 23, 1996. The sentencing guidelines for this amount of cocaine base call for a base offense level of 36, which, along with a criminal history category of IV, requires a term of

imprisonment of 262 to 327 months. Ms. Tingle was sentenced to a term of imprisonment of 262 months on this count.

The evidence at trial concerning the Count One conspiracy with Eric Laws established that most of the time, he received cocaine powder, not crack cocaine, in quantities of ½ ounce to an ounce, and that he cooked it up himself. The evidence also established that in 1995, there was only a maximum of one and a half months that it was possible for Mr. Laws to have purchased this cocaine powder from Ms. Tingle. Mr. Laws testified that during that time, he was doing business not with Ms. Tingle but with her boyfriend, Tutu. The evidence established that in 1996, Mr. Laws had only from January 19th to May 29th in which he could purchase drugs from anyone. In sentencing Ms. Tingle on Count One, the judge utilized the amount of crack cocaine, 636 grams, in addition to the cocaine powder. She was sentenced to a term of imprisonment of 262 months, to run concurrently with her sentence on Count Two.

The United States Court of Appeals for the Seventh Circuit dismissed Ms. Tingle's conviction under Count Two, thereby eliminating the 636 grams of crack cocaine. Under the sentencing guidelines, the base offense level for the amount of cocaine powder that constituted the conviction under the conspiracy count would be lower than 36, and would be at most, level 32. Yet the Court of Appeals stated that dismissing Count Two would not affect her sentence for each count because they were to run concurrently. However, it is clear that in dismissing Count Two, the 636 grams of crack cocaine could no longer be used in determining her sentence under the conspiracy, which did not include this specific distribution charge.

Although the conspiracy count included the date of June 23, 1996, the specific charge of distributing 636 grams of cocaine base to Oscar Rathers on June 23, 1996 was not part of that count because, as noted by the Court of Appeals, it would have been impermissibly duplicitous. *United States v. Marshall*, 75 F.3d 1097, 1111 (7th Cir. 1996); *see also Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946). By singling out the distribution to Oscar Rathers on June 23, 1996, in a separate count of the indictment, the conspiracy count had to end before that date and could not include any drugs distributed on that date.

In *United States v. Rodriguez-Moreno*, __ U.S. __, 119 S. Ct. 1239, 143 L. Ed. 2d 388 (1999), this Court held that wherever the underlying offenses, such as conspiracy to distribute drugs and kidnapping, are essential elements of another offense, such as the use of a firearm, venue is proper wherever the underlying offense continues, regardless of whether the other offense takes place in that venue. In the case at bar, however, the underlying offense of conspiracy to distribute cocaine in Wisconsin is not an essential element of the other offense of distributing cocaine in Illinois on June 23, 1996. Consequently, the 636 grams of cocaine seized on June 23, 1996 cannot be used as part of the conspiracy count.

In *Edwards v. United States*, 523 U.S. 511, 118 S. Ct. 1475, 140 L. Ed. 2d 703 (1998), a case from the Seventh Circuit Court of Appeals, the defendant was convicted of possession and distribution of cocaine and crack cocaine. A general verdict of guilty was returned, and the judge imposed sentences based on his finding that the defendant's illegal conduct had involved both cocaine and crack. The defendant appealed, arguing that the sentences were unlawful insofar as they were based on crack cocaine. This Court affirmed,

finding that the sentences imposed were within the statutory limits applicable for cocaine-only conspiracy. But this Court pointed out that the statutory and constitutional claims could have made a difference if the crack-related activities did not constitute part of the same course of conduct, common scheme or plan. This Court stated that the crack, had it not been part of the "offense of conviction", would not have been part of the sentence-related relevant conduct at all. 118 S. Ct at 1478. In the case at bar, once the crack cocaine allegedly distributed to Oscar Rathers on June 23, 1996, was eliminated by the dismissal of Count Two, the only cocaine left was cocaine powder, which calls for a lower base offense level. Even assuming *arguendo* that the conspiracy included the distribution of some crack cocaine, there was no evidence presented by the prosecution that the amount of any such crack cocaine came anywhere near the 636 grams that the sentence was based upon. A reduction in Ms. Tingle's sentence is clearly appropriate.

It is respectfully submitted that this Court exercise its supervisory power and order a reduction of the sentence that reflects the elimination of the 636 grams of crack cocaine from her convictions.

CONCLUSION

This case presents a question of exceptional importance — whether the prosecutor's knowing use of perjured testimony, which forced the petitioner's counsel to disclose her prior incarceration when the petitioner did not take the stand and testify on her own behalf, violated the petitioner's constitutional right to a fair trial. The knowing use of the perjured testimony, along with the prosecutor's knowledge that petitioner would not testify, made it reasonably likely that the false testimony affected the judgment of the jury and resulted in a fundamentally unfair conviction.

In addition, the Court of Appeal's dismissal of Count Two eliminated the 636 grams of crack cocaine from petitioner's convictions and should have resulted in a lower base offense level under the sentencing guidelines and a reduced sentence on Count One.

Accordingly, Dapheny Tingle respectfully requests that her petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED JULY 8, 1999

In the United States Court of Appeals
For the Seventh Circuit

No. 98-2637

United States of America,

Plaintiff-Appellee,

v.

Daphney D. Tingle,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin. No. 97 CR 149 — J.P. Stadtmueller, Chief Judge.

Argued December 8, 1998 — Decided July 8, 1999

Before Coffey, Ripple, and Manion, Circuit Judges.

Manion, Circuit Judge. A jury convicted Daphney Tingle of conspiring to distribute cocaine base and distributing cocaine base. On appeal, she argues that: the district court improperly denied her motion for a continuance of the trial; the evidence was insufficient to convict; the Eastern District of Wisconsin was an improper venue for her trial on the distribution charge; the district, court erred in failing to grant

a mistrial based on the government's use of perjurious testimony; and the jury instruction dealing with the testimony of witnesses was erroneous. Because the Eastern District of Wisconsin was not a proper venue, we reverse Tingle's conviction for distributing cocaine base, but affirm her conviction for conspiring to distribute cocaine base.

I. Facts

Beginning at least by 1995, Tingle ran a drug distribution business out of her home in Chicago, Illinois. Testimony from a co-conspirator — Eric Laws — indicated that Tingle would "front" him drugs, that is, sell drugs on credit. Laws, who lived and sold the drugs in Racine, Wisconsin, testified that he or his couriers would pick up cocaine from Tingle or her boyfriend "Tutu" at Tingle's home, and would transport it to Racine. Another co-conspirator — Mario Hudson — who joined the conspiracy in the latter part of 1996, corroborated this testimony. He confirmed that Tingle dispensed crack cocaine to him and that he paid for it only after reselling the drugs. In May 1996, after the police arrested Hudson for drug possession, he began cooperating with the police. Hudson told the police that on June 23, 1996, a courier named Oscar Rathers would be transporting drugs from Tingle's house to Racine.

As Hudson predicted, Rathers left Racine on June 23, boarded a train to Chicago, and proceeded to Tingle's house. Carrying a small backpack, Rathers entered Tingle's home, stayed inside for eight minutes, and then departed for the train station. He then returned to Racine delivering the backpack to the home of Allen Judon. After Rathers left

Judon's home, the police arrested him and found him carrying about two ounces of crack cocaine. Shortly thereafter, the police executed a search warrant at Judon's house and recovered the backpack, which contained over 600 grams of crack cocaine.

On August. 19, 1997, Tingle was indicted for one count of conspiring to distribute in excess of fifty grams of cocaine base, and one count of distributing cocaine base, in violation of 21 U.S.C. sec. sec. 841(a)(1) & 846, and 18 U.S.C. sec. 2. After a four-day trial, the jury convicted Tingle of both counts. She was sentenced to 262 months' imprisonment and five years of supervised release for each count, with the sentences to run concurrently.

II. Analysis

A. Motion to Continue Trial

Tingle first argues that the district court improperly denied her motion to continue the trial. " '[T]his court will overturn a trial court's disposition of a motion to continue only for an abuse of discretion and a showing of actual prejudice.' " United States v. Koen, 982 F.2d 1101, 1114 (7th Cir. 1992) (quoting United States v. Blandina, 895 F.2d 293, 297 (7th Cir. 1989)). In assessing claims of inadequate time to prepare for trial, we examine the amount of time available for preparation, the likelihood of prejudice from the denial of additional time, the complexity of the case, the adequacy of the defense actually provided at the trial, the skill and experience of the attorney, and any representation of the accused by other attorneys. United States v. Zambrana,

841 F.2d 1320, 1327 (7th Cir. 1988). Because district courts necessarily require great latitude in scheduling trials, broad discretion must be given to a district court in its decision concerning a motion to continue. Morris v. Slappy, 461 U.S. 1, 11 (1983).

Tingle was arraigned on September 17, 1997. Two days later, her family retained attorney Chester Blair to represent her. On October 30, a magistrate judge allowed Tingle to substitute counsel, but cautioned the parties that the court's scheduling order was to remain in effect, including the November 17 trial date. On November 12 or 13, just days before her scheduled trial, one of Tingle's new attorneys — Jimmie Jones — moved to continue the trial until December 22, 1997, citing other professional commitments and the need to further prepare Tingle's case. The district judge eventually postponed the trial until December 1, but refused to grant the additional twenty-one days requested by Tingle.

Tingle argues in a conclusory fashion that she "was severely prejudiced" by the district court's denial of her motion to continue. She fails, however, to specify any way in which she suffered prejudice, other than to contend that she needed more time to prepare her defense. Applying the factors mentioned above, we note that Tingle's first attorney represented her interests and filed motions on her behalf, including a motion to suppress evidence. Furthermore, Tingle's motion to continue indicates that Jones is an experienced criminal litigator. It is also relevant that this is a straightforward drug conspiracy case, which is not particularly complex. At trial, the government produced only ten witnesses whose testimony concerned common events.

Other than her coconspirators, most of their testimony concerned relatively minor points. In any event, Jones was sufficiently prepared to raise numerous evidentiary objections during the direct examination of the government's witnesses, aggressively cross-examine them, and to successfully demonstrate that Eric Laws' recollection was faulty.

Besides Jones, Tingle was also represented at trial by another attorney — Mark Lyon. Furthermore, Tingle has not argued that additional time would have resulted in a more vigorous defense, nor has she shown that her defense was deficient in any respect. Thus, Tingle has failed to demonstrate that the district court abused its discretion in granting only a two-week continuance, and she failed to show that the failure to grant a further continuance caused her actual prejudice.

B. Sufficiency of the Evidence

Tingle next argues that the evidence was insufficient to convict her of conspiring to distribute cocaine base. This challenge requires us to determine whether in viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. United States v. Hach, 162 F.3d 937, 942 (7th Cir. 1998). To sustain a conspiracy conviction, the record must contain evidence showing that a conspiracy to distribute cocaine existed, and that Tingle knowingly joined it. Hach, 162 F.3d at 942. To establish the existence of a drug conspiracy, as opposed to a series of mere buy-sell agreements, the government must

provide "proof of an agreement to commit a crime other than the crime that consists of the sale itself." United States v. Pearson, 113 F.3d 758, 761 (7th Cir. 1997) (quoting United States v. Lechuga, 994 F.2d 346, 347 (7th Cir. 1993) (en banc)). In determining whether a conspiracy existed, a defendant's guilt can often be inferred from circumstantial evidence, including whether she stood to gain financially from the conspiracy. United States v. Miller, 159 F.3d 1106, 1110 (7th Cir. 1998). We have also identified four highly probative factors: (1) the length of affiliation; (2) the established method of payment; (3) the extent to which the transactions were standardized; and (4) the demonstrated level of mutual trust. Hach, 162 F.3d at 943. "An individual's participation in drug deals which involve credit transactions such as 'fronting' is strong evidence of membership in a conspiracy." United States v. Rodriguez, 53 F.3d 1439, 1445 (7th Cir. 1995) (internal quotations omitted).

In the present case, the jury heard testimony from Tingle's associates in her cocaine distribution activities: Eric Laws, Mario Hudson, and Oscar Rathers. Eric Laws identified Tingle at trial, and testified that he first obtained cocaine from her at her home in Chicago around the "[f]irst part of '95." He also stated that he generally received from Tingle two deliveries of cocaine per month. Tingle fronted the drugs to Laws. The jury also learned that Laws' drug-dealing enterprise was briefly impeded by his incarceration between May and September 1995, but his activities began again when he was released. Laws testified that generally he or his comrades (Derrel Garth, Davin Laws, Oscar Rathers, and Mario Hudson) would go to Chicago about twice each month to get the drugs. Laws estimated that after his release

from prison in 1995 he made between ten and fifteen trips to Chicago himself. Usually Tingle or her boyfriend Tutu would give them a kilogram of cocaine, and would charge between $22,000 and $26,500, which Laws would pay only after he sold the cocaine to others. Laws further testified that although he usually obtained cocaine powder from Tingle (from which he manufactured crack cocaine), he also obtained crack cocaine from her.

Oscar Rathers testified that he acted as a drug courier. He would periodically go to Tingle's house in Chicago to meet someone he knew only as "Daf." He would give her his bag, she would fill it, and he would return to Racine with the drugs and get paid $300 for his efforts. On two occasions he also obtained two smaller bags of cocaine from Tingle, which he sold himself.

Mario Hudson testified that he was involved with Eric Laws in selling crack cocaine between January and June 1996. Hudson stated that in February 1996 he accompanied Laws to Gurnee Mills, Illinois to deliver to Tingle drug money which Laws owed. A few days later, Hudson and Laws had a conversation in which Laws said he needed to get some more drugs, so they sent Oscar Rathers to Chicago for them. Hudson testified that they generally obtained the cocaine from Chicago twice every month. Laws would then distribute the cocaine among a group consisting of Davin Laws, Allen Judon, and Hudson, who would sell the cocaine to others. Hudson also stated that the cocaine came in the form of cocaine base (or crack) and powder cocaine.

DEA Special Agent Erin Desmond also testified at trial. Desmond testified that she was surveilling Tingle's home

on June 23, 1996. She personally saw Rathers enter the house with a knapsack, and a few minutes later she saw him exit with the same knapsack. Desmond also testified that she was present when Tingle was arrested and questioned about her involvement in the sale of cocaine. After signing a waiver of her rights, Tingle admitted she made telephone calls in an effort to obtain cocaine for Eric Laws, and that the Laws brothers obtained cocaine from her residence after other distributors dropped it off there.

To summarize, Tingle's comrades testified that she fronted drugs, and that they delivered money for the cocaine to her and her boyfriend after it was resold. Their testimony also indicated a long-term association with Tingle. The evidence showed that there was a degree of trust among Tingle and her associates, and they had a standardized practice for the distribution of the cocaine. Finally, even Tingle admitted to the officers that she played at least some part in arranging for suppliers to drop off cocaine at her residence so that Eric Laws and his comrades could later retrieve it. In short, there was an abundance of evidence upon which the jury could have convicted Tingle of conspiring to distribute cocaine base. Hence, Tingle cannot prevail on this ground.

C. Improper Venue

Tingle also challenges her conviction on Count II for distribution of cocaine base, arguing that the Eastern District of Wisconsin was an improper venue for her trial, because this offense took place in the Northern District of Illinois. This, she argues, requires a reversal of her distribution

conviction.[1] When faced with a claim of improper venue we view the evidence in the light most favorable to the government in determining whether the government showed by a preponderance of the evidence that the crime occurred in the district charged. United States v. Brandon, 50 F.3d 464, 469 (7th Cir. 1995).

Article III of the U.S. Constitution states: "Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." U.S. Const. art. III, sec. 2, cl. 3. Similarly, the Sixth Amendment guarantees a defendant a trial "by an impartial jury of the State and district where the crime shall have been committed . . . ." U.S. Const. amend. VI. The Federal Rules of Criminal Procedure echo these provisions by requiring that "the prosecution shall be had in a district in which the offense was committed." Fed. R. Crim. P. 18. Accordingly, when "a defendant is charged in more that one count, venue must be proper with respect to each count." United States v. Granados, 117 F.3d 1089, 1091 (8th Cir. 1997).

When Congress has not specifically defined where a crime should be deemed to have occurred, the " 'locus delicti must be determined from the nature of the crime alleged and the location of the act or acts constituting it.' " Cabrales, 118 S. Ct. at 1776 (quoting United State v. Anderson, 328 U.S. 699, 703 (1946)). "To determine venue, we examine the key verbs in the statute defining the criminal offense

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1. Tingle concedes that the Eastern District of Wisconsin was a proper venue for the conspiracy charge. However, this does not prevent Tingle from challenging the venue for the distribution count.

to find the scope of the relevant conduct." United States v. Georgacarakos, 988 F.2d 1289, 1293 (1st Cir. 1993) (internal quotations omitted). "Actions which are merely preparatory or prior to the crime," however, "are not probative in determining venue." Id.

A problem potentially arises when the acts constituting a crime are committed in more than one state or district. To address these multi-state crimes, Congress enacted legislation (under its power to define the elements of a crime) which allows these crimes — sometimes called "continuing offenses" — against the United States to be tried in any of the venues in which a part of the crime was committed.[2] See 18 U.S.C. sec. 3237(a). Under this statute, venue is constitutionally proper in any district in which a part of the crime was committed. Granados, 117 F.3d at 1091. " '[W]here a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done.' " United States v. Rodriguez-Moreno, 119 S. Ct. 1239, 1244 (1999) (quoting United States v. Lombardo, 241 U.S. 73, 77 (1916)). The statute provides in part:

> [A]ny offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which

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2. We note that the term "continuing offense" can be used in more than just a factual sense. See United States v. Yashar, 166 F.3d 873, 875 (7th Cir. 1999) (discussing continuing offenses for purposes of statutes of limitations and noting that the term is distinguishable from its use in the factual sense).

> such offense was begun, continued, or completed. Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and . . . may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

18 U.S.C. sec. 3237(a). Thus, venue for continuing crimes is proper where the crimes began, continued, or were completed. United States v. Kramer, 955 F.2d 479, 486 (7th Cir. 1992); Georgacarakos, 988 F.2d at 1293. Distribution of drugs can be a continuing offense, and thus governed by sec. 3237(a) for purposes of venue, where there are multiple acts of the defendant which constituted distribution. Georgacarakos, 988 F.2d at 1293; United States v. Brunty, 701 F.2d 1375, 1380 (11th Cir. 1983); cf. Andrews v. United States, 817 F.2d 1277, 1279 (7th Cir. 1987).

In the present case, Tingle was charged with a violation of 21 U.S.C. sec. 841(a)(1), which states: "it shall be unlawful for any person knowingly or intentionally — (1) to manufacture, [or] distribute . . . a controlled substance."[3] The indictment specifically charged that the offense was committed: (1) on June 23, 1996, (2) by distributing cocaine

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3. The term "distribute" means to deliver. 21 U.S.C. sec. 802(11). "Deliver" means "the actual, constructive, or attempted transfer of a controlled substance . . . ." 21 U.S.C. sec. 802(8). Courts usually interpret the term "distribution" and related words quite broadly. United States v. Ahumada-Avalos, 875 F.2d 681, 683 (9th Cir. 1989).

base to Oscar Rathers, (3) in the Eastern District of Wisconsin and the Northern District of Illinois. The government had the burden of establishing the elements of venue by a preponderance of the evidence. Brandon, 50 F.3d at 469. The evidence showed that Tingle indeed distributed cocaine base to Oscar Rathers on June 23, 1996 in the Northern District of Illinois. It is also apparent that Tingle distributed cocaine to Allen Judon (through Rathers) on June 23, 1996 in the Eastern District of Wisconsin. But the problem is that there was no evidence that Tingle distributed cocaine on June 23, 1996 to Oscar Rathers in Wisconsin (the venue of the trial). Instead, the evidence clearly established that all of the acts necessary for Tingle's crime of distributing cocaine to Rathers were committed in Illinois, and none were committed in Wisconsin.

Of course, if the indictment had alleged that Tingle had distributed cocaine base to Allen Judon (or others) in the Eastern District of Wisconsin, venue would have been proper there, regardless of the fact that Tingle never left Illinois. But this is a separate offense from the distribution to Rathers, and any attempt to allege these two offenses in one count of the indictment would have resulted in a duplicity problem.[4] United States v. Marshall, 75 F.3d 1097, 1111 (7th Cir. 1996) (" 'Duplicity' is the joining of two or more offenses in a single count."). As it is, the indictment did not allege this distribution to Judon or anyone other than Rathers. Because the government failed to show that even part of the crime of

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4. Notably, Tingle argues that the second count was duplicitous, and that there was insufficient evidence that Tingle distributed cocaine base to Rathers in Wisconsin. Because we reverse Tingle's distribution conviction, there is no need to address these issues.

distributing cocaine base to Oscar Rathers occurred in the Eastern District of Wisconsin, it was not a proper venue for her trial on this charge. Moreover, the fact that the government alleged that Tingle aided and abetted the crime of distribution of cocaine base to Oscar Rathers cannot save her conviction, for the cocaine base was distributed to Oscar Rathers only in Illinois, and any aiding and abetting done by Tingle was done in Illinois.

The government's reliance on United States v. Pomranz is unavailing. 43 F.3d 156 (5th Cir. 1995). In Pomranz, the defendant was charged with conspiracy to distribute marijuana and unlawful use of a firearm during a drug trafficking offense. Id. at 157. Pomranz argued that his trial for both crimes in the Northern District of Texas was improper because he only used the firearm in Oklahoma. The Fifth Circuit affirmed his conviction. Id. at 158. It held that the drug trafficking offense was a predicate offense of the firearm charge, and because this predicate offense was committed in the Northern District of Texas, part of the firearm charge was committed in the Northern District of Texas. Id. at 162. Therefore, Texas was a proper venue for the trial on the firearm charge. Recently, the Supreme Court used similar reasoning in holding that venue was proper for a use of a firearm charge wherever the underlying offense of kidnaping continued, regardless of whether the firearm in question was also used in that venue. Rodriguez-Moreno, 119 S. Ct. at 1244.

These cases are easily distinguishable from Tingle's. In Pomranz and Rodriguez-Moreno, the underlying offenses (conspiracy to distribute drugs and kidnaping) were essential

elements of the firearm charge. But Tingle's conspiracy offense (which was committed in Wisconsin) was not an essential element of her distribution charge. Thus, even though she committed at least part of the conspiracy offense in Wisconsin, Tingle did not commit any part of the charged distribution offense in Wisconsin. Without her having committed at least some part of the distribution offense in Wisconsin (and it need only have been a small part), venue was not proper there. Because the Eastern District of Wisconsin was not a proper venue for Tingle's trial on this count,[5] her conviction of distribution of cocaine base must be reversed. This will not affect Tingle's sentence, however, for the sentence on this count was to run concurrent with her conspiracy sentence.

D. Use of Perjury

Tingle contends that one of the government's witnesses — Eric Laws — committed perjury at trial, the government knew of the perjury, and therefore the district court erred in denying her motion for a mistrial.

We review the district court's refusal to grant a new trial based on the government's purported use of perjury for an abuse of discretion. United States v. Thompson, 117 F.3d 1033, 1035 (7th Cir. 1997). The district court abuses its discretion when it makes an error of law or when it makes a clearly erroneous finding of fact. United States v. Silva, 140

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5. This rule did not place an undue burden on the government by requiring two trials. The Northern District of Illinois was a proper venue for a trial on both counts alleged in the indictment, thus permitting the government to try Tingle in Illinois for both crimes.

F.3d 1098, 1101 n.4 (7th Cir. 1998). To obtain a new trial based on use of perjurious testimony, a defendant must establish that (1) the government presented perjured testimony; (2) the government knew or should have known of the perjury; and (3) there is some likelihood that the false testimony affected the jury's verdict. Thompson, 117 F.3d at 1035.

To satisfy the first requirement, Tingle contends that Eric Laws testified that he obtained cocaine from Tingle in January 1995, which had to be false, because Tingle was incarcerated for an unrelated offense between January and May 1995.[6] Tingle, however, mischaracterizes Laws' testimony. On direct examination he testified that he dealt with Tingle during the "[f]irst part of '95." This testimony is ambiguous, as the "first part of '95" could reasonably be interpreted to mean the first quarter of 1995, the first half of 1995, the first three quarters of 1995, and so on. If the "first part of '95" were construed to mean "around the first part of 1995," this might also include the latter part of 1994. In short, while a person could reasonably interpret the "first part of '95" to mean "January 1995," it is also susceptible to many

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6. Like Eric Laws, Tingle had some difficulty in correctly recalling the dates of her incarceration. She sometimes argues that she was incarcerated in 1995, at other times she contends that it was in 1996, and still another time that it was 1997. Because the indictment does not charge Tingle for any crimes committed in 1997, we presume that Tingle's mention of this year is an error, or is at least irrelevant. Furthermore, because the part of Eric Laws' testimony to which Tingle objects relates to dealings with Tingle in the "[f]irst part of '95" we presume that this is the period on which her argument is based.

other interpretations, including periods during which Tingle was not imprisoned. Because of this ambiguity, Laws was forced to clarify his statements on cross-examination and redirect. Eric Laws testified that he knew Tingle was imprisoned during the early part of 1995 (although he could not remember the exact time period), and that during her incarceration he merely talked with her on the telephone, and obtained cocaine from her boyfriend, Tutu. Despite Tingle's imprisonment, cocaine was still distributed from her home in Chicago, just as it was before and after her incarceration. He also testified that he could not remember the exact date of any occasion that he met with Tingle, but he knew that he began dealing with Tingle at least six months before her incarceration in 1995. This testimony does not contradict Eric's other testimony or any other evidence presented at trial. Thus, Tingle has failed to show that Eric Laws' testimony was perjurious.

Finally, assuming arguendo that Laws had testified falsely, Tingle failed to show that there was some likelihood that this testimony impacted the jury's verdict, especially considering that Laws admitted he was unsure of the exact date he began receiving cocaine from Tingle. If anything, this aided Tingle's case by demonstrating to the jury that Laws' memory was imperfect. Beyond that, the fact that Tingle was unable to counter the testimony that she fronted cocaine on numerous occasions between January 1995 and June 1996, and her own statements to the officers that Eric Laws obtained cocaine from her house, also makes it highly unlikely that Eric Laws' statements had any further adverse impact on the jury's assessment of Tingle's guilt. Thus, Tingle cannot prevail on this argument.

E. Jury Instruction

Tingle also challenges a jury instruction concerning the testimony of the witnesses. She objects to the instruction that jurors "should use statements by other persons to decide what the defendant did or said." Specifically, Tingle objects to the use of the word "should," because she believes that this effectively instructed the jurors that the testimony of the government's witnesses is necessarily credible, thus denying the jury its prerogative of making credibility determinations.

We review jury instructions to determine whether they provide fair and accurate summaries of the law. United States v. Abdelkoui, 19 F.3d 1178, 1182 (7th Cir. 1994). The district court is given substantial discretion with respect to the exact wording of instructions. Id. Looking at the charge as a whole, we must determine whether the instruction misled the jury concerning the issues or its duty in relation to those issues. United States v. McClellan, 165 F.3d 535, 549 (7th Cir. 1999).

The instruction at issue here cannot reasonably be read to mean, as Tingle suggests, that all of the witnesses should be believed. Furthermore, reading the instructions as a whole, we see that the district court specifically told the jurors that they were "the sole judges of the credibility of witnesses and the weight their testimony deserves." Also, the jury was informed that "[i]f you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves." Thus, no reasonable jury could have understood the instructions to mean that all of the government's witnesses were to be considered credible.

Finally, we also note that we previously approved the exact language of this instruction, including the use of the word "should." See United States v. Martinez de Ortiz, 907 F.2d 629, 635 (7th Cir. 1990). However, other formulations may be preferable, as the wording of jury instructions is not an exact science. United States v. Smith, 131 F.3d 685, 688 (7th Cir. 1997). Thus, while use of the word "should" is not incorrect, in the future, to avoid a similar question, district courts would be better advised to substitute the term "may." In this instruction, use of the term "may" more accurately reflects the idea sought to be conveyed. Likewise, use of the term "may" would foreclose appeals based on arguments like Tingle's.

III. Conclusion

The district court did not abuse its discretion in failing to grant a further continuance of the trial. Moreover, the evidence presented at the trial was more than sufficient to convict Tingle of conspiracy to distribute cocaine base. Because Tingle failed to show that the government introduced perjurious testimony, or that this testimony impacted the jury's verdict, the district court did not err in refusing to grant a new trial on the conspiracy charge. The district court also did not err in instructing the jury. As to the distribution charge, Wisconsin was not a proper venue for this crime as it was charged in the indictment. Therefore, we reverse Tingle's conviction of distribution of cocaine base (Count II), and affirm her conviction of conspiracy to distribute cocaine base. Because Tingle's sentences for each count were to run concurrently, this reversal will not affect her terms of imprisonment or supervised release.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED JULY 8, 1999

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: July 8, 1999

BEFORE: Honorable JOHN L. COFFEY, Circuit Judge
Honorable KENNETH F. RIPPLE, Circuit Judge
Honorable DANIEL A. MANION, Circuit Judge

No. 98-2637

UNITED STATES OF AMERICA,

Plaintiff – Appellee

v.

DAPHNEY D. TINGLE,

Defendant – Appellant

Appeal from the United States District Court for the
Eastern District of Wisconsin
No. 97 CR 149, J. P. Stadtmueller, Chief Judge

The judgment of the District Court is REVERSED as to Tingle's conviction of distribution of cocaine base (Count II), and AFFIRMED as to her conviction of conspiracy to distribute cocaine base. The above is in accordance with the decision of this court entered on this date.

APPENDIX C — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN DATED AND FILED SEPTEMBER 16, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case Number: 97-CR-149-003

UNITED STATES OF AMERICA

V.

DAPHENY DENISE TINGLE

(AMENDED)
JUDGMENT IN A CRIMINAL CASE

Jimmie L. Jones
Mark A. Lyon
Defendant's Attorneys
Christian R. Larsen
Assistant United States Attorney

THE DEFENDANT:

was found guilty on Counts One and Two after a plea of not guilty.

Appendix C

Title & Section	Nature of Offense	Date Concluded	Count(s)
21 U.S.C. §§ 846 and 841(a)(1).	Conspiracy to distribute in excess of 50 grams of cocaine base.	9/11/97	1
21 U.S.C. §§ 846 and 841(a)(1) and 18 U.S.C. § 2.	Distribution of in excess of 50 grams of cocaine base.	9/11/97	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Pursuant to the judgment of the United States Court of Appeals for the Seventh Circuit entered on July 8, 1999, in appeal 98-2637, the judgment of conviction as to the offense charged in Count 2 of the indictment is vacated and said count is herewith dismissed based upon the court of appeals finding that venue in the Eastern District of Wisconsin was improper.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Appendix C

Defendant's Soc. Sec. No.:
318-64-2354

Date of Amended Judgment:
September 16, 1999

Defendant's Date of Birth:
3/17/68

Defendant's USM No.:
08336-424

s/ J.P. Stadtmueller
J. P. Stadtmueller
Chief Judge

Defendant's Legal Address:
827 North Karlov Street
Chicago, IL 60651

September 16, 1999
Date Amended Judgment
Signed

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of two hundred sixty-two (262) months.

The defendant is remanded to the custody of the United States Marshall.

The court makes the following recommendation to the Bureau of Prisons:

(1) that the defendant be incarcerated at F.C.I. — Oxford, Wisconsin.

* * *

Appendix C

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a total term of five (5) years.

The defendant shall not commit another federal, state, or local crime and shall comply with the following special conditions:

1. The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. The defendant shall not possess a firearm as defined in 18 U.S.C. § 921 or other dangerous weapon.

3. Pursuant to the Violent Crime Control and Law Enforcement Act of 1994, the defendant shall not illegally possess any controlled substance. Such possession will result in revocation of the supervised release term and the defendant will serve a term in prison.

4. The defendant is to participate in a program of testing and residential or outpatient treatment for drug and alcohol abuse, as directed by her supervising probation officer, until such time as the defendant is released from such program. The defendant is to refrain from the use of all alcoholic beverages throughout the period of this supervision.

5. The defendant is to provide access to all financial information to her supervising probation officer.

6. The defendant shall not associate with any member, prospect or associate member of the Four Corners Hustlers Gang or any gang. The defendant shall have no communication whatsoever with the Four Corners Hustlers Gang or any gang.

7. The defendant shall participate in a mental health treatment program and shall take any and all prescribed medications as directed by the treatment provider and participate in any psychological/psychiatric evaluation and counseling as may be directed by her supervising probation officer.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

Appendix C

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5 Part B.

	Assessment	Fine	Restitution
Totals:	$200.00	$0	$0

FINE

Based on the defendant's limited finances, the court determines that the defendant does not have the financial ability to pay a fine, the interest on a fine, costs of incarceration, community confinement and supervision and therefore waives the fine, interest on the fine, costs of

incarceration, costs of community confinement and supervision in this case.

A waiver of the cost of community confinement does not preclude the Bureau of Prisons from imposing a subsistence fee of up to 25 percent of gross income, based on ability to pay, for any portion of the sentence spent in a community correctional facility.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment.

Special instructions regarding the payment of criminal monetary penalties:

The $200.00 special assessment is due and payable immediately to the Clerk of Court's office, Room 362, U.S. Courthouse.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All Criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States Attorney.

Appendix C

STATEMENT OF REASONS

The court adopts the factual findings and guideline applications as set forth in the 4/20/98 presentence report.

Guideline Range Determined by the Court:

Total Offense Level: 36

Criminal History Category: IV

Imprisonment Range: 262 to 327 months

Supervised Release Range: 5 years

Fine Range: $20,000.00 to $8,000,000.00 (with costs of imprisonment/supervision)

Fine waived because of inability to pay.

$200.00 special assessment

This sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

(1) because of the prodigious and serious nature of the defendant's crimes in combination with her criminal history.